Nos. 85-971 and 85-975

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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ROBERT L. CLAREN, COMPTROLLER OF THE CURRENCY,
*Petitioner,*

—v.—

SECURITIES INDUSTRY ASSOCIATION,
*Respondent.*

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SECURITY PACIFIC NATIONAL BANK,
*Petitioner,*

—v.—

SECURITIES INDUSTRY ASSOCIATION,
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## BRIEF FOR RESPONDENT

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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Based on its long-standing concerns over the concentration of economic power, Congress always has restricted both the substance and location of national bank activities. The National Bank Act authorizes a national bank to engage only in specifically defined activities (12 U.S.C. § 24) and to conduct "general business" only at "the place specified in its organization certificate" or at those intrastate "branches" permitted by state law (12 U.S.C. § 81). The Comptroller of the Currency found that certain securities brokerage activities were authorized as part of the general business of national banks, but nevertheless ruled those activities were not subject to the geographic restrictions upon that business. The courts below found the Comptroller's locational ruling contrary to law and declared it null and void.

1. Did the courts below correctly hold that brokerage operations, as part of the statutorily authorized business of a national bank, are subject to the geographic restrictions that apply to "the general business" of all such banks?

2. Did the courts below correctly hold that securities brokers injured by bank competition against which Congress arguably legislated have standing to challenge the Comptroller's permissive ruling in that respect?

## PARTIES TO THE PROCEEDINGS BELOW

Respondent Securities Industry Association ("SIA") was the plaintiff-appellant-cross-appellee below.* Defendants-appellees-cross-appellants below were C.T. Conover, then Comptroller of the Currency of the United States, and the Office of the Comptroller of the Currency. Petitioner Robert L. Clarke now serves as Comptroller of the Currency. Petitioner Security Pacific National Bank was permitted to intervene by the Court of Appeals after entry of the panel opinion.

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* Pursuant to Rule 28.1 of this Court, respondent states as follows: The Securities Industry Association is a national trade association representing more than 500 securities brokers, dealers and underwriters who are responsible for more than 90 percent of the securities brokerage and investment banking business in the United States.

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## BRIEF FOR RESPONDENT

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## COUNTERSTATEMENT OF THE CASE

### A. The Administrative Proceedings

On August 26, 1982, the Comptroller of the Currency ("Comptroller") permitted Security Pacific National Bank to open securities brokerage offices throughout its home state of California and across the country. (30a.)[1] Conducted through an operating subsidiary, the offices would among other things "solicit and service new customers and provide local locations for the receipt of securities."[2] On September 20, 1982, the Comptroller approved the application of Union Planters National Bank of Memphis to acquire a broker engaged in securities brokerage in Tennessee and six other states, and to continue to conduct that business across state lines. (47a.)

In approving these applications, the Comptroller ruled that the National Bank Act of 1864, as amended, included securities execution services (*i.e.*, securities brokerage alone, offered without investment advice) as part of the business statutorily allowed to national banks. Even so, the Comptroller ruled that *this* bank activity is not subject to the geographic restrictions otherwise imposed by statute on the general business of all national banks. (39a-45a.)

Those geographic restrictions are set forth in 12 U.S.C. § 81 (hereafter "Section 81") and 12 U.S.C. § 36 (hereafter "Section 36").[3] Section 81, the fundamental geographic restriction

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1 The Court has granted the consent motion filed by the Solicitor General to dispense with printing the joint appendix. 106 S. Ct. 2271 (1986). The opinions and relevant portions of the record below are included in the appendices annexed to the Federal Petitioner's Petition for a Writ of Certiorari filed on December 9, 1985. Citations to material printed in those appendices appear as "____a."

2 Comptroller of the Currency, Administrative Record, Application dated June 10, 1982 by Security Pacific National Bank to Establish an Operating Subsidiary 58-59, *reprinted in* Joint Appendix at A-155-56, *Securities Industry Ass'n* v. *Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir. 1985).

3 The relevant text of these provisions is set forth in the Statutory Appendix annexed hereto.

upon national bank activities, limits "the general business" of a national bank to its headquarters and any "branches" permitted by Section 36. Section 36, in turn, permits national banks only to establish intrastate branches and only to the extent allowed by state law.

In concluding that these geographic restrictions do not apply to brokerage services conducted by banks, the Comptroller reasoned that a "branch" exists under Section 36 only where deposits are received, checks paid or money lent. (44a.) Finding that securities brokerage does not directly involve any of these three specific activities, the Comptroller reasoned that the locations where brokerage alone is conducted would not be "branches." Omitting any mention at all of the fundamental single-office restriction in Section 81, the Comptroller concluded that national banks may locate those functions at any location they choose. (45a.)

On October 26, 1982 the SIA, a national trade association whose members are responsible for more than ninety percent of the securities brokerage business in the United States, commenced this action for declaratory and injunctive relief, challenging the Comptroller's novel ruling.

**B. The Opinions Below**

On cross-motions for summary judgment, the district court first upheld the standing of the SIA to challenge the Comptroller's ruling. The district court concluded that, through the geographic restrictions, Congress arguably had legislated against the bank competition the SIA sought to prohibit. As the court put it, Section 81 of the National Bank Act, together with the Section 36 branching limits, "evince the intent of Congress to curb the scope of national banks' activities." (577 F. Supp. at 258, 24a.) Relevant competitive injury-in-fact to the SIA's members also having been established, the court confirmed the SIA's standing in this litigation. (577 F. Supp. at 258-59, 24a.)

Turning to the merits, the court found securities execution services to be an authorized part of "the general business" of national banks, and as such subject to the geographic restrictions imposed by Congress on that business. (577 F. Supp. at 260, 29a.) Relying upon the statutory language, legislative history and settled precedent, the district court held that brokerage activities are subject to the restrictions of Section 36, just as are other bank activities aimed at "attracting and servicing customers conveniently." (577 F. Supp. at 261, 29a.)

The district court also rejected the Comptroller's argument that Section 36 restricts only intrastate activities, so that banks would be free in any event to conduct activities outside of their home state. As the court explained, the Comptroller's analysis

> ignores completely the fact that the McFadden Act was a limited extension of the National Banking Act provisions for the locations of bank offices, which previously had allowed national banks only one central office. Never have national banks been authorized under the National Bank Act to maintain offices outside their home state.

(577 F. Supp. at 260, 28a.)

On cross-appeals the Court of Appeals, with a dissent, affirmed the district court in a *per curiam* opinion, "generally for the reasons stated [by the district court]." (758 F.2d 739, 740, 1a, 2a.) On July 12, 1985, the Court of Appeals denied petitioners' requests for rehearing and suggestions for rehearing *en banc*. (765 F.2d 1196, 5a.) The Comptroller and Security Pacific filed separate Petitions for a Writ of Certiorari.[4] The Court granted those petitions on March 3, 1986. 106 S. Ct. 1259 (1986).

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4 On September 9, 1985, the SIA petitioned for a Writ of Certiorari to review the issue of whether national banks may conduct securities execution services at all. The Court denied that petition on January 13, 1986. *Securities Industry Ass'n* v. *Comptroller of the Currency*, 106 S. Ct. 790 (1986).

## SUMMARY OF ARGUMENT

1. The fundamental restriction on the location of national bank operations is set forth at 12 U.S.C. § 81 ("Section 81"). Enacted over a century ago, that provision as amended restricts "the general business" of any national bank to its main office and to permitted branches located within the same state. The Comptroller found that certain brokerage operations are authorized as part of a national bank's business. Even so, his ruling permitted banks to locate those operations at *any* site they choose, regardless of the geographic restrictions on their business. Thus contravening the plain language of Section 81, the ruling for this reason alone was correctly voided below.

2. The history of Section 81 underscores its applicability. That section originally had limited the "*usual* business" of each national bank to a single office. In 1927 Congress changed that phrase to limit the location of each bank's "*general* business," while also permitting that business to be conducted at branches in addition to the main office. As part of the same statute, Congress for the first time recognized the authority for national banks to engage in buying and selling investment securities.

There is no indication that, in modifying Section 81 to limit the locations of "the general business" of a national bank in 1927, Congress intended in any way to exclude from that limitation the securities activities simultaneously authorized for banks. To the contrary, the absence of any statutory definition of "the general business" compels the conclusion that its ordinary, all-encompassing meaning was intended by Congress. Certainly the geographic restriction of that phrase covers *at least* those activities Congress expressly authorized for banks in the National Bank Act, including the brokerage activities involved here.

3. The interstate securities activities of banking organizations during 1920-30, cited by petitioners, are immaterial to the issue here. Those activities were conducted, not by banks organized under the National Bank Act, but by separate, non-subsidiary *affiliates* of those banks. The locational restrictions of that Act, however, generally apply only to banks and not to such affiliates. Also, the Comptroller has made clear that all laws, including geographic restrictions, that apply to national banks apply equally to operating subsidiaries, such as those involved here.

4. Because Section 81 is dispositive, it is unnecessary even to reach definitional questions concerning a bank "branch" under 12 U.S.C. § 36 ("Section 36"). Remarkably, however, the Comptroller's ruling ignored Section 81 entirely and instead focused solely on the definition of a "branch." The Comptroller reasoned that the term "branch" does not "include" more than the three functions enumerated in Section 36(f) (accepting deposits, cashing checks or loaning money). Because securities brokerage is not one of those functions, the Comptroller concluded that it can be located wherever banks choose. The ruling contravened logic, legislative intent and legal precedent.

a. The Comptroller's branching ruling elides the structure of the statute and thereby creates its own logical Catch-22. Section 36 does not stand alone. Rather, its branching provisions were enacted as an exception to the overall limitation of Section 81 that otherwise restricts a national bank's business solely to its main office. Taking the statutory structure into account, the Comptroller's rationale actually leads to the opposite result: If, as the Comptroller ruled, a "branch" would exist *only* where one of the three enumerated functions is performed, it follows that a branch could not exist *unless* one of those three functions were performed there. All other bank activities, however, remain subject to the overall restriction of Section 81. Hence, ex "branch," the other activities such as securities brokerage would be limited solely to the bank's main office and not, as the Comptroller concluded,

freed of any locational restriction whatever. Section 36, as well, contradicts the Comptroller's logic. Its definition of a branch "includes" expressly "*any*" place, which of course covers every place. The section therefore cannot also "include" more *places*, as the Comptroller would read it; rather, the section must "include" more *functions*.

b. The legislative history of the McFadden Act expressly demonstrates that Congress did not intend to limit "branches" to the three functions enumerated. The Conference Committee Report accompanying the Act stated that a national bank could conduct "general business" "not only" at its main office "but also" at branches, thereby making clear that a "branch" is not restricted simply to the three functions listed in the definitional section. Representative McFadden confirmed just that in an analysis this and every other court to have considered the issue have found highly significant. He made clear that the term "branch" encompasses any place where a bank "carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office.*"

c. The Comptroller's present interpretation is also contrary to the rationale articulated by every appellate court to have addressed the locational restrictions. This Court, in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 135 (1969), found that the term "branch bank" "includes" at the very least "*any* place" for conducting one of the three enumerated functions and "may include more." The Court of Appeals in *St. Louis County National Bank* v. *Mercantile Trust Co. National Bank*, 548 F.2d 716, 719 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977), found that "the three routine banking functions delineated in Section 36(f) are not the only indicia of branch banking," and therefore voided the Comptroller's effort to sanction a bank's trust office at an unlicensed location. The Courts of Appeals for the Tenth, Seventh and District of Columbia Circuits have also set forth a similar approach in other cases. The Comptroller's suggestion that

"branch" activities are somehow limited solely to activities requiring a banking or similar license defies the statutory branching definition itself; two of the three functions enumerated in the definition (cashing checks and making loans) require no such license and are carried on by any number of non-bank entities.

5. The Comptroller's ruling is not due deference. The ruling does not address Section 81, the fundamental geographic restriction on bank activities. Arguments presented in this Court on that subject are simply *post hoc* rationalizations by counsel entitled to little deference. Further, the issues here are purely ones of statutory interpretation over which the courts must be the final arbiters. This is not even an instance in which Congress has vested an administrator with relevant rule-making authority; to the contrary, Congress, by statute, has expressly *withheld* any authority for the Comptroller to issue rules or regulations under the provisions at issue.

6. Petitioners concede that the SIA "obviously" has "adequate adversity of interest" under Article III of the Constitution to challenge the Comptroller's ruling but assert nevertheless that the prudential concerns underlying the "zone of interests" rationale should bar this action. The Court, however, has stated that where, as here, a litigant has standing under Article III, such prudential concerns are generally resolved.

Further, the Court articulated the zone of interests rationale to enlarge the class of people who may protest administrative action. The rationale is satisfied when "Congress had *arguably* legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 620 (1970) (emphasis supplied); *see Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 154 (1970). The rationale requires neither express legislative history indicating that Congress intended to protect the specific complainants nor demon-

stration that Congress had indeed prohibited the competition at issue. *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970).

The Court repeatedly has upheld the standing of non-bank competitors to challenge the Comptroller's rulings permitting expanded bank activities under the National Bank Act, which arguably was intended to prohibit them. Here, too, Congress ("arguably", at the very least) has legislated against the competition sanctioned by the Comptroller, and the complainants, members of the SIA, will suffer competitive harm from the Comptroller's action. That the competitive factor in this case is the location rather than the substance of bank activities is immaterial. The limit in Section 81 on the location of bank activities, together with the limit in 12 U.S.C. § 24 (Seventh) on the nature of those activities, restrict the permissible scope of competition by banks—to the benefit of *all* bank competitors.

Focusing (as did the dissent below) solely on the branching provisions of Section 36, petitioners argue that Congress intended the section only to benefit banks and therefore the SIA has no standing to challenge rulings concerning it. But the branching provisions of Section 36 are a limited exception to the overall main office restriction in Section 81, and, as integrally related parts of the statutory structure, those provisions should be considered together. That Congress relaxed the basic geographic restriction to permit some branching does not eliminate its underlying intent in enacting the basic limit in the first place. And, that intent was to restrict the location of bank competition, arguably to the benefit of competitors such as the SIA.

## ARGUMENT

The same fundamental flaw pervades petitioners' analysis *both* as to substance and as to standing. As will appear, petitioners base their entire case almost exclusively on the branching provisions of Section 36 and simply ignore the basic geographic restrictions of Section 81, even though it is equally involved. The structure of the statute, as well as its language and the Congressional intent underlying it, leave no doubt (a) that the Comptroller's ruling is contrary to law and (b) that members of SIA, as competitors of banks in the brokerage business, have standing to challenge that ruling.

## I

## THE COMPTROLLER'S RULING VIOLATES THE LOCATIONAL RESTRICTIONS OF THE NATIONAL BANK ACT

At bottom, this case rests on a classic have-your-cake-and-eat-it-too contention. Having first succeeded in arguing that discount brokerage *is* a proper part of any national bank's general business, petitioners now contend that, even so, it should be excluded from the strict locational limitations imposed on the general business of every national bank. The courts below rejected this contention and voided the Comptroller's ruling encompassing it. They were correct. The ruling contravened the plain language of the basic geographic restriction on the business of national banks, as well as the Congressional intent in enacting the branching provisions that amended it.

### A. The Comptroller's Ruling Contravened the Basic Statutory Restriction on the Location of a National Bank's Business

The fundamental restriction on the location of a national bank's business is codified at 12 U.S.C. § 81. Remarkably, the Comptroller's ruling did not contain one word concerning this provision, and petitioners' present arguments also all but ignore it. The provision is dispositive.

The starting point for all statutory analysis, of course, is the language of the statute itself. *E.g.*, *Bread Political Action Comm.* v. *Federal Election Comm'n*, 455 U.S. 577, 580 (1982). The relevant statutory language here provides that:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

12 U.S.C. § 81. Branches, in turn, may be established as permitted by applicable state law "within the state in which [a national bank] is situated." 12 U.S.C. § 36(c).

The statute is thus clear: national banks may locate their business only at their headquarters or licensed branches within the same state. Yet, even though the Comptroller found discount brokerage to be a proper part of a national bank's business, he permitted banks to establish such operations at any location they choose. Directly at odds with the plain language of the statute, the Comptroller's decision was appropriately voided by the courts below. The Court need go no further. "If the statute is clear and unambiguous, 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress'."[5]

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5 *Board of Governors* v. *Dimension Financial Corp.*, 106 S. Ct. 681, 686 (1986) (quoting *Chevron U.S.A., Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See also Consumer*

The history of the language in Section 81, however, simply underscores its plain meaning. That language originated with the National Bank Act of 1864, the statute that created and enables the continued existence of national banks.[6] As originally enacted, the section provided:

> The usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate.

R.S. 5190, ch. 106, 13 Stat. 101 (1864). As the Court has confirmed, Congress by this limitation restricted national banks to transacting their business at only one location.[7] The

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*Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

SIA thus agrees with petitioners that this is a plain language case. Brief for the Federal Petitioner (hereafter "Fed. P.") at 27-29; Brief for Petitioner Security Pacific National Bank (hereafter "Sec. Pac.") at 15-19. But the plain—and controlling—language here is that of Section 81, which petitioners all but ignore, and not that of Section 36, upon which petitioners almost exclusively rely.

6 From the time Congress first chartered the Bank of the United States in 1816, through the creation of the national bank system during the Civil War, to the present, a fundamental tenet of federal policy has been that banks are institutions of limited, statutorily defined powers that have no authority beyond that expressly granted by law. *E.g.*, *California Bank* v. *Kennedy*, 167 U.S. 362, 366 (1897); *First National Bank in St. Louis* v. *Missouri ex rel. Barrett*, 263 U.S. 640, 656 (1924); *Texas & Pacific Ry.* v. *Pottorff*, 291 U.S. 245, 253 (1934). In enacting the McFadden legislation, Congress unquestionably understood that it was proceeding "[u]nder the general theory that a national bank cannot do anything for which it does not have specific authority of law," and that all powers "should be expressly granted." 66 Cong. Rec. 1585 (1925) (statement of Rep. McFadden).

7 *First National Bank in St. Louis* v. *Missouri ex rel. Barrett*, 263 U.S. 640, 656-58 (1924); *Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35, 42-43 (1977). Significantly, the Court expressly held in the *St. Louis* case—shortly before passage of the McFadden Act—that the "multiplication of places where the powers of a bank may be exer-

language of this section remained unchanged for the ensuing six decades, until it was amended in 1927, as part of the McFadden Act, to read as it now does. Through this amendment Congress substituted the broader phrase "the general business" for the phrase "the usual business" of banks and also permitted that business for the first time to be transacted in authorized branches in addition to a bank's main office. McFadden Act, ch. 191, § 8, 44 Stat. 1229 (1927) (codified at 12 U.S.C. § 81).

Significantly, in another part of the McFadden Act, Congress for the first time recognized the authority of banks to engage in the "buying and selling of investment securities" as part of their business. McFadden Act, ch. 191, § 2, 44 Stat. 1226 (1927). *See Awotin* v. *Atlas Exchange National Bank*, 295 U.S. 209 (1935). As petitioners point out (Fed. P. at 31-33; Sec. Pac. at 22-25), the legislative history of the McFadden Act shows that its supporters believed that buying and selling those securities was properly a part of a bank's general business. The Senate Report characterized that activity variously as "a legitimate banking service," a "form of service demanded by banks", and a service "too important to banks to hang by . . . a slender thread of legal interpretation."[8] The Comptroller of the Currency described this activity during hearings on the legislation in 1924 as "additional forms of banking ser-

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cised" does *not*, contrary to petitioners' argument (Fed. P. at 30-31; Sec. Pac. at 21-22), fall within the scope of a bank's "incidental" powers. 263 U.S. at 659. *See* 67 Cong. Rec. 9291 (1926) ("Under the decision of the Supreme Court in the St. Louis case [263 U.S. 640 (1924)], it was held that no national banking association could do anything not specifically permitted by law. . . ." (Statement of Sen. Shipstead). *See also* 66 Cong. Rec. 4524 (1925) ("We have assumed that branch banks may not be established by national banks unless they can point to the letter of authority of the law.") (Statement of Sen. Pepper, member of the Senate Banking Committee, Senate sponsor of the bill and member of the Conference Committee that considered it).

8 S. Rep. No. 666, 68th Cong., 1st Sess. 6 (1924).

vice"[9] and the bill's principal sponsor called it a "recognized service which banks must render."[10]

It simply defies logic to argue that when Congress broadened the express powers of national banks to include the business of buying and selling securities, it did not also intend to include that business within the simultaneously broadened phrase, "the general business" of a national bank, set forth in Section 81. No indication whatever exists that Congress intended to narrow the ordinary meaning of that phrase.[11]

Indeed, the omission of any statutory definition of "the general business" compels the assumption that " 'the legislative purpose is expressed by the ordinary meaning of the words used'." *Securities Industry Ass'n* v. *Board of Governors*, 468

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9 *Consolidation of National Banking Associations, Etc.: Hearings on H.R. 6855 Before the House Committee on Banking and Currency*, 68th Cong. 1st Sess. 8 (1924) (testimony of Comptroller Dawes).

10 66 Cong. Rec. 1585-86 (1925) (statement of Rep. McFadden). *See also* 67 Cong. Rec. 2828 (1926) (investment securities business regarded as part of "an existing banking service or business") (statement of Rep. McFadden). In *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207, 215 (1984) this Court noted: "Banks have long arranged the purchase and sale of securities as an accommodation to their customers. Congress expressly endorsed this *traditional banking service* in 1933." (Emphasis supplied.)

11 The distinction between the business of banking and the business of buying and selling securities petitioners now urge (Fed. P. at 32; Sec. Pac. at 24-27) would have been easy enough to accomplish if Congress had intended it. The section of the National Bank Act that Congress amended in 1927 to recognize the "business of buying and selling investment securities" had from its inception granted national banks "all such incidental powers as shall be necessary to carry on *the business of banking*" and listed specific activities in that respect. 12 U.S.C. § 24 (Seventh) (emphasis supplied). *See Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137, 158-59 n.11 (1984). Had Congress meant the locational restriction of Section 81 to reach only the "business of banking," it presumably would have amended the section to say just that. Instead, as noted, Congress broadened Section 81 to cover a national bank's "general business"—a phrase obviously broad enough to encompass the transaction of a bank's "business" in all its respects, including the then newly recognized securities business.

U.S. 137, 149 (1984) ("*SIA*") (quoting *Russello* v. *United States*, 464 U.S. 16, 21 (1983)). The ordinary meaning of "general" connotes an all-encompassing intent.[12] Accordingly, whatever its outer reaches may be, the phrase "the general business of a [national bank]" certainly encompasses *at least* those activities Congress has expressly sanctioned for such banks. And, the securities brokerage involved here has been held to constitute the "business of dealing in securities and stock" that is expressly authorized for national banks.[13]

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12 *E.g.*, *Webster's Third International Dictionary* 944 (1966), defining "general" as "involving or belonging to the whole of a body, group, class or type: applicable or relevant to the whole rather than to a limited part, group, or section."

13 12 U.S.C. § 24 (Seventh). *See* 577 F. Supp. at 257, 20a; *aff'd*, 758 F.2d 739, 1a; *cert. denied*, 106 S. Ct. 790 (1986). As noted, the McFadden Act in 1927 authorized national banks to engage in the "business of buying and selling investment securities." Six years later, as part of the Glass-Steagall Act, Congress amended this language to all but eliminate that authority, permitting only a very restricted "business of dealing in investment securities." Banking Act of 1933 (Glass-Steagall Act), ch. 89, § 16, 48 Stat. 184. That language, in turn, was amended two years later to read, as it now does, the "business of dealing in securities and stock." Banking Act of 1935, ch. 614, § 303, 49 Stat. 707 (codified at 12 U.S.C. § 24 (Seventh)).

It is thus unnecessary to speculate what activities other than those enumerated in 12 U.S.C. § 24 (Seventh) may or may not also be included within "the general business" of a national bank. It may well be that certain support functions, such as data processing, that do not involve transacting business with the public may be carried on at non-branch locations. Indeed, the courts below expressly based their holding on the undeniable fact that the provision of brokerage services here "is clearly aimed at attracting and servicing customers conveniently" (577 F. Supp. at 260, 28a)—thus applying a factor this and other courts uniformly have regarded as relevant in deciding branching questions. *E.g.*, *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 136-37 (1969) ("*Plant City*") (armored car service); *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921, 943 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976) ("*IBAA*") (customer-bank communication terminals); *St. Louis County National Bank* v. *Mercantile Trust Co. National Association*, 548 F.2d 716, 719 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) ("*Mercantile Trust*") (trust office). Contrary to petitioner's suggestion (Fed. P. at 27), the courts below simply did not address, nor will their opinions affect, the location of bank support activities that do not involve transactions with the public.

Petitioners attempt (Fed. P. at 31-34; Sec. Pac. at 24-26) to support a contrary conclusion from the locations of the securities activities of banks during 1920-30. This case, however, concerns the locational restrictions of the National Bank Act, and those restrictions generally apply only to banks themselves, not to banks' non-subsidiary affiliates.[14] The securities activities cited by petitioners (Fed. P. at 31; Sec. Pac. at 23-25), to the extent they involved banks organized under the National Bank Act, were conducted by *affiliates* and not by the banks themselves.[15] Whatever and wherever they may have been, those activities are simply immaterial to the issue here.[16]

Further, the affiliation between national banks and securities entities during the 1920s occurred almost without exception through means other than direct ownership.[17] This difference in corporate organization is significant, as the Comptroller has both pointed out in this case[18] and recognized by regula-

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14 That is, of course, unless the affiliates are used to evade otherwise applicable locational restrictions. *E.g.*, *Jackson* v. *First National Bank of Gainsville*, 430 F.2d 1200 (5th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965).

15 *Operation of the National and Federal Reserve Banking Systems: Hearings on S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 71st Cong., 3d Sess. 1055-57 (1931) (hereafter "*1931 Hearings*"); W. Peach, *The Securities Affiliates of National Banks* 51-52 (1941) (hereafter "*Peach*").

16 Petitioners' allusions to the supposed "interstate nature" of "national bank activities" in the 1920s (Sec. Pac. at 24-25) or the "interstate securities offices" operated by banks at that time (Fed. P. at 33), in the context of this case, border on the disingenuous.

17 *1931 Hearings* at 1056; *Peach* at 68. National banks (as distinct from some state chartered banks) were prohibited from owning stock. *Id.*

18 Comptroller's Petition for a Writ of Certiorari ("Compt. Pet.") at 10 n.10 ("while bank subsidiaries may be funded with bank funds, holding company subsidiaries may not"). For example, while the ability of a national bank to provide funds to its affiliates is statutorily restricted, 12 U.S.C. § 371c, Congress expressly excluded from that restriction any majority-owned subsidiary of a bank (12 U.S.C.

tion.[19] The Comptroller made clear in permitting national banks to create directly-owned operating subsidiaries that "all provisions of Federal banking law applicable to the operations of the parent bank" are equally applicable to their subsidiaries—confirming that banks may not utilize subsidiaries to evade the limitations that apply to banks. 12 C.F.R. § 5.34(d)(2)(i) (1986).

Petitioners' effort to divine Congressional "acquiescence" in their position from Congress' consideration and enactment of the International Banking Act of 1978, Pub. L. No. 95-369, 92 Stat. 607 *et seq.*, (Fed. P. at 37-38; Sec. Pac. at 31), is particularly anomalous. In enacting that statute, which regulated the activities of foreign banking entities for the first time, Congress was careful to make clear that its actions should *not* be construed as any precedent concerning locational restrictions on the activities of national banks. The House Report put it succinctly:

> Resolutions involving the more controversial issues—interstate branching . . . —should be viewed only as efforts to deal with specific situations related to the unique status or operations of foreign banks. There is no intent to use the legislation as a means for setting precedents or policies affecting the domestic banking system.[20]

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§ 371c(b)(2)(A)), because such a subsidiary "should be regarded as part of its parent bank." S. Rep. No. 536, 97th Cong., 2d Sess. 31 (1982).

19 *See* 12 C.F.R. § 5.34 (1986).

20 H.R. Rep. No. 910, 95th Cong., 2d Sess. 8 (1978). Congressional action four years later underscores the absence of any supposed "acquiescence" in petitioners' current position. In 1982, Congress amended the Bank Service Corporation Act to authorize bank service corporations to engage in so-called "non-banking" activities to the extent permitted by the Federal Reserve Board for bank holding companies under the statute governing those entities. Bank Service Corporation Act, Pub. L. No. 97-320, tit. VII, § 409, 96 Stat. 1542 (1982) (codified at 12 U.S.C. § 1864(f)). Discount securities brokerage is included among those activities. 12 C.F.R. § 225.25(b)(15) (1986). In so doing, however, Congress expressly confirmed that "the provisions

In sum, the unambiguous language of Section 81 specifies that banks may conduct their business only at their headquarters and at permitted branches. Securities brokerage authorized as a part of that business is equally subject to the governing geographic restrictions. The decision below should be affirmed for this reason alone.

### B. The Comptroller's Ruling also Contravened the Branching Provision Applicable to a National Bank's Business

Given the dispositive impact of Section 81, examination of the branching provision applicable to national banks, 12 U.S.C. § 36, is unnecessary. Review of the Comptroller's ruling concerning that provision, however, shows that the courts below correctly found it contrary to law.

First, the Comptroller's ruling approached Section 36 as if it were suspended in a statutory vacuum. Section 36(f) defines a "branch" as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(f). Focusing exclusively on that section, the Comptroller concluded that its definition is limited to the three functions expressly set forth (taking deposits, cashing checks and lending money). Because securities brokerage is not one of those functions, the Comptroller reasoned, banks are free to transact that business at any site. (44a.) This analysis, how-

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of Federal and State branching law regulating the geographic location of banks to the extent that those laws are applicable" will still govern any activity so authorized for a bank service corporation. 12 U.S.C. § 1864(f). If Congress had understood, as petitioners now argue, that the locational restrictions of the National Bank Act have no application at all to so-called "non-banking" activities of bank subsidiaries, the quoted language obviously would not have been included in the statute.

ever, ignores that Section 36 does not stand alone. It was enacted as, and remains, an *exception* to the overall restriction of Section 81, which otherwise limits a national bank's general business to one office. (*See* Point I.A, *supra*.)

Taking this statutory structure into account, the Comptroller's reasoning actually leads to the opposite result. If, as the Comptroller ruled, a "branch" would exist *only* where one of the three enumerated functions is performed, it follows that a "branch" could not exist *unless* one of those functions were performed there. All other activities, including securities brokerage, would remain subject to the overall restriction in Section 81. Accordingly, ex "branch," those activities could be located only at a bank's main office—not, as the Comptroller concluded, at any location whether licensed or unlicensed, intrastate or interstate.

Second, the Comptroller's branching analysis is directly contrary to the legislative history of the McFadden Act. The present language of Section 81 derives from a Senate amendment to the McFadden bill initially passed by the House. The House bill had permitted banks to establish "branches," which were defined (as now) to "include" any place where "deposits are received or checks cashed or money loaned." H.R. 2, 69th Congress, 1st Sess., § 8 (1925). The bill also provided that "the general business of each [national bank] shall be transacted in the place specified in its organization certificate" (*id.*) but did not state that a bank's general business could also be transacted at branches. The Senate, however, left no doubt in this regard. It amended the House language to read (as it does now): "The general business of each [national bank] shall be transacted in the place specified in its organization certificate *and* in the branch or branches, if any, established or maintained by it. . . ." S. Rep. No. 473, 69th Cong., 1st Sess. 4 (1926) (emphasis supplied).

The subsequent Conference Report accompanying the McFadden Act highlighted the significance of the Senate amendment. As the Statement of the House Managers, including Representative McFadden, put it:

> The Senate amendment provides that national banks might transact general business *not only* at the place specified in the organization certificate *but also* at such branches as the bank might lawfully maintain under the provisions of the bill. The House bill contained no similar provision, and the House recedes with an amendment making clerical changes.

H.R. Rep. No. 1481, 69th Cong., 1st Sess. 4-5 (1926) (emphasis supplied). Congress thus understood a branch to encompass not only the three functions specifically enumerated in the House-drafted definition of that term but also "general business" transacted at banks' headquarters. Representative McFadden's own analysis of the Act, placed in the Congressional Record shortly after it was passed, underscored the point. He said:

> [Section 36(f)] defines the term "branch." Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office*, is a branch if it is legally established under the provisions of this act.

68 Cong. Rec. 5816 (1927) (emphasis supplied).[21] In short, as the courts below found, the Comptroller's restrictive definition of "branch" flies right in the face of congressional intent.

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21 This Court, the courts below and every Court of Appeals to have considered it have found this statement highly significant. *See Plant City*, 396 U.S. at 134 n.8; 577 F. Supp. at 259, 26a; *IBAA*, 534 F.2d at 931; *Mercantile Trust*, 548 F.2d at 719; *Illinois ex rel. Lignoul v. Continental Illinois National Bank & Trust Co.*, 536 F.2d 176, 179 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *Colorado ex rel. State Banking Board v. First National Bank of Fort Collins*, 540 F.2d 497, 500 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) ("*Fort Collins*"). In light of this precedent, petitioners' effort to deride this legislative history as "post enactment" (Compt. Pet. at 13 n.12; Sec. Pac. Pet. at 16) is, at best, unpersuasive.

Moreover, as petitioners note (Fed. P. at 20, n.11), Congress amended the branching provisions in 1933 to permit state-wide branching as well as the city-wide branching that originally had been authorized in 1927. *See* Banking Act of 1933 (Glass-Steagall Act), ch. 89, § 23, 48 Stat. 189 (codified at 12 U.S.C. § 36(c)). It did so with full

Third, the Comptroller's ruling contravenes the holdings of every appellate court to have addressed the issue. This Court addressed the branching provision in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) ("*Plant City*"). It stated:

> Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

*Id.* at 135 (footnote omitted, emphasis in original). The Court there rejected the Comptroller's attempt to read the definition of "branch" narrowly and held that an armored car messenger service operated by a national bank was a "branch" of that bank under Section 36.

Following a similarly flexible approach, Courts of Appeals also uniformly have refused attempts by the Comptroller, either as a party or as an *amicus*, to restrict the reach of the branching provisions. The Eighth Circuit in *St. Louis County National Bank* v. *Mercantile Trust Co. National Bank*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) ("*Mercantile Trust*"), for example, specifically declined to accept the Comptroller's argument, advanced once again here, that the term "branch" includes only the three functions specifically enumerated in Section 36(f). The Court held that "the three routine banking functions delineated in Section 36(f) are *not* the only indicia of branch banking," and struck down the Comptroller's effort to sanction a bank's trust office opened at a non-branch location. *Id.* at 719 (emphasis supplied). The Courts of Appeals for the Tenth, Seventh and

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knowledge of Representative McFadden's analysis, yet Congress made no change at all either in the language of the overall geographic restriction in Section 81 or in the definition of "branch" in Section 36(f).

District of Columbia Circuits have articulated a similar approach in other cases.[22]

The Comptroller nevertheless attempts to portray the *Mercantile Trust* decision as novel. (Fed. P. at 40 n.26.) Actually, it is the Comptroller who, by suggesting that Section 36(f) be limited only to bank activities involving "dealings with the public requiring a specialized banking or similar license," has urged an unprecedented interpretation. (43a-44a; *see* Fed. P. at 40.) The Comptroller offers no support for this whole-cloth suggestion. Nor could he, in that two of the three functions enumerated in Section 36(f) itself—lending money and paying checks—require no national banking charter or other specialized license and are carried on by any number of entities. Congress plainly intended no such restriction of the statutory definition.

Finally, contrary to petitioners' suggestion (Fed. P. at 36; Sec. Pac. at 31), the decisions below do not set any precedent concerning what *level* of bank activities may be permissible at

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22 *Fort Collins*, 540 F.2d at 499 ("accepting deposits, or paying checks, or lending money are *not* the only indicia of branch banking. The typical bank of the present time provides many other services.") (emphasis supplied); *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *IBAA*, 534 F.2d at 932.

The extent to which petitioners reach to find *any* authority to support their position is, itself, telling: their sole authority is *Continental Illinois National Bank & Trust Co.* v. *Lignoul*, No. 76-C-2209 (N.D. Ill. Nov. 9, 1976) (Fed. P. at 28-29; Sec. Pac. at 18 n.11), an unpublished memorandum opinion of a district court filed one month *prior* to the directly contrary ruling in *Mercantile Trust*. Petitioners nevertheless cite *Lignoul* to suggest that the word "include" in Section 36(f) relates to the places where a bank may transact business rather than the nature of those activities. (Fed. P. at 28-29; Sec. Pac. at 18 n.11). But, as the Court confirmed in *Plant City*, Section 36(f) covers "*any* place," 396 U.S. at 135 (emphasis in original), at which the three enumerated functions are performed and "may include more" (*id.*). It would be patently illogical to conclude that Section 36(f) was intended to "include" more *places* than are already included in the phrase "*any* place", which of course includes every place. The word "include" obviously relates instead to the *functions* listed in the section.

remote locations. Here, concededly, the brokerage facilities would involve the full panoply of discount brokerage services for the public and as such are unquestionably subject to the locational restrictions on the business of national banks.[23]

In sum, logic, legislative history and legal precedent all confirm that the Comptroller's branching ruling was contrary to law. For this reason, too, his ruling was properly voided by the courts below.

### C. No Deference is Due the Comptroller's Ruling

Given the Comptroller's failure to mention, let alone consider, the import of Section 81 in his analysis of Section 36, petitioners' suggestion of "deference" to his ruling rings hollow. (Fed. P. at 37, 41; Sec. Pac. at 31-32.) Where "the Comptroller adopted no expressly articulated position at the administrative level," subsequent rationalizations of his action by appellate counsel are "hardly tantamount to an administrative interpretation." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 627-28 (1971). And, as the Court recently confirmed, such "*post hoc* rationalizations by counsel for agency action are entitled to little deference." *SIA*, 468 U.S. at 143.

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23 The SIA has never contended, nor did the courts below decide, that banks may not employ agents who must act elsewhere to perform functions in support of services offered at chartered locations, which is all that was involved in *Merchants Bank* v. *State Bank*, 77 U.S. (10 Wall.) 604 (1871), cited by petitioners. (Fed. P. at 30-31, 42; Sec. Pac. at 23.) That issue concerns the *level* of activities permissible for remote locations and not the *type* of permitted activities. *See Plant City*, 396 U.S. at 137 n.10.

The Comptroller's reference (Fed. P. at 36) to activities such as loan production offices in non-branch locations also is unavailing. The legality of those offices, of course, is not at issue here and may depend upon different facts. See *Independent Bankers Ass'n of America* v. *Heimann*, 627 F.2d 486, 48 r.** (D.C. Cir. 1980), in which the court noted that when bank loan production offices exceeded a certain level of activity in providing services to customers, those offices would be subject to the Act's restrictions. In any event, references to other activities cannot be bootstrapped into legalizing the interstate location of bank offices for brokerage services.

Further, the Comptroller's ruling involved "the quintessential judicial function of deciding what a statute means."[24] The courts have the "ultimate responsibility to construe the language employed by Congress,"[25] and deference, as the Court has said, "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."[26] This teaching has particular application in the circumstances here, in that Congress, by statute, has expressly *withheld* any authority for the Comptroller to issue regulations under Section 36.[27]

Discussion of judicial deference to an administrative agency is actually "pointless" where the agency action "violate[s] the plain language of the Act, as well as the statutory purposes revealed by the legislative history." *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31 (1981). As the Court put it in voiding a similarly unprecedented action by another bank regulator:

> A reviewing court "must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."

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24 *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 98 n.8 (1983). *See also Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). The Administrative Procedure Act, of course, directs that agency action is to be set aside by the courts wherever it is found to be "not in accordance with law". 5 U.S.C. § 706(2)(A).

25 *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969); *see NLRB* v. *Brown*, 380 U.S. 278, 291-92 (1965).

26 *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, 464 U.S. at 97 (quoting *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965)).

27 Depository Institutions Deregulation and Monetary Control Act of 1980, § 708, 94 Stat. 188 (codified at 12 U.S.C. § 93a). *See SIA*, 468 U.S. at 154 (rulemaking authority also withheld as to substantive restrictions on bank securities activities).

*SIA*, 468 U.S. at 143 (citations omitted). So here. As shown, the ruling in this case not only ignored the mandate of Section 81 but also contravened the intent of Section 36. In short, the Comptroller's ruling that permitted expanded bank locations in this case, as in numerous earlier cases,[28] is entitled to little, if any, deference. The decision below should be affirmed.

## II

## THE SIA HAS STANDING UNDER THE NATIONAL BANK ACT TO CHALLENGE THE COMPTROLLER'S RULING

Article III of the Constitution, of course, limits federal courts to adjudicating actual "cases" and "controversies." *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983); *Flast* v. *Cohen*, 392 U.S. 83 (1968). To satisfy Article III requirements, a litigant must have "standing" to invoke the power of a federal court. *See, e.g., Allen* v. *Wright*, 468 U.S. 737, 750 (1984); *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). That standing arises where a litigant "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,"[29] and "the injury 'is likely to be redressed by a favorable decision.' "[30]

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28 Indeed, if the Court had deferred as urged now to the Comptroller's previous interpretations of the statutory restrictions on bank locations, both *Plant City*, 396 U.S. 122 (1969), and *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), would have yielded different results. The court below similarly rejected the Comptroller's efforts to relax the geographic constraints on banks in *IBAA*, 534 F.2d 921 as did the Eighth Circuit in *Mercantile Trust*, 548 F.2d 716 and the Tenth Circuit in *Fort Collins*, 540 F.2d 497.

29 *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984) (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979)).

30 *Heckler* v. *Mathews*, 465 U.S. at 738 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)).

Here, no question exists as to the SIA's constitutional standing. Petitioners long ago abandoned any contention (22a) that members of the SIA would not suffer competitive "injury in fact" from the Comptroller's action, which plainly they would (23a), and that injury clearly would be redressed by a favorable decision. In short, as petitioners concede, "there obviously is adequate adversity of interest in this case to satisfy the requirements of Article III of the Constitution." (Compt. Pet. at 24 n.19; *see* Sec. Pac. Pet. at 19.) That said, any issue as to the SIA's standing should be all but obviated. For, while the Court has articulated extra-constitutional, "prudential" concerns relating to standing, the Court has also made clear that when, as in this case, a litigant has standing under Article III those concerns are generally resolved:

> Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requirements are met.

*Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 80 (1978).[31]

Petitioners nevertheless seek to slam the courthouse door on the SIA through use of one of the prudential doctrines—the "zone of interests" rationale. Petitioners' ironic reliance on this "limitation" (*e.g.*, Fed. P. at 16) is misplaced. Originally developed in the context of challenges under the Administrative Procedure Act, 5 U.S.C. § 702, to rulings by the Comp-

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31 *Accord Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 263-64 (1977). *See* L. Tribe, *American Constitutional Law* 10-15 (Supp. 1979). *Cf. Barlow* v. *Collins*, 397 U.S. 159, 172 (1970) (Brennan, J., concurring in the result and dissenting)("Standing exists when the plaintiff alleges . . . that the challenged action has caused him injury in fact, economic or otherwise."). The various prudential concerns apply only in "appropriate circumstances." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979). *See also Warth* v. *Seldin*, 422 U.S. at 499.

troller, the zone of interests rationale was actually designed to "*enlarge*[ ] . . . the class of people who may protest administrative action." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 154 (1970) ("*Data Processing*") (emphasis supplied). It requires simply that "the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153 (emphasis supplied). And, it is satisfied when "Congress had arguably legislated against the *competition* that the petitioners sought to challenge, and from which flowed their injury." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 620 (1971) (emphasis supplied).[32] It is not necessary under the rationale to "rely on any legislative history showing that Congress desired to protect" specific competitors, *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970), or to show that "Congress had indeed prohibited [the competition at issue]." *Investment Co. Institute*, 401 U.S. at 620.[33]

The Court repeatedly has applied this rationale to uphold the standing of non-bank competitors to challenge the Comp-

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32 As one commentator has said, to satisfy the zone rationale, a litigant need not be regulated by the statute but need only show that it is "significantly involved in activities affected by those who are regulated." 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3531.7 at 512 n.16 (1984). *See also* Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 Mich. L. Rev. 1445, 1479 (1971).

33 The zone of interests rationale, when first articulated, contradistinguished the earlier "legal interest" test. *Data Processing*, 397 U.S. at 153. Except as a logical counterpoint to that earlier, restrictive test, it is questionable whether a separate zone of interests rationale would be needed under the Administrative Procedure Act, in that the statute expressly specifies standing for any party "adversely affected or aggrieved" by agency action. 5 U.S.C. § 702. *See* 4 K. Davis, *Administrative Law Treatise* § 24:17 (2d ed. 1983); *cf. Synar* v. *United States*, 626 F. Supp. 1374 (D.D.C. 1986) (Scalia, Johnson, Gasch, JJ.) (dispensing with zone of interests test where the statute at issue provided that "any. . . person *adversely affected* by any action under this title, may bring an action. . . ."') (emphasis supplied), *aff'd sub nom. Bowsher* v. *Synar*, No. 85-1377 (U.S. July 7, 1986).

troller's rulings permitting expanded bank activities under the National Bank Act:

> — In *Data Processing*, companies offering data processing services to the general business community had standing, under the zone rationale, to challenge the Comptroller's ruling pursuant to the National Bank Act that national banks could make data processing services available to other banks and to bank customers—in competition with the data processing companies. 397 U.S. at 157.
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> — In *Arnold Tours*, travel agents serving the general public had standing, under the zone rationale, to challenge the Comptroller's ruling pursuant to the National Bank Act that national banks could provide travel services for their customers—in competition with the travel agents. 400 U.S. at 46.
>
> — In *Investment Co. Institute*, open-end investment companies had standing, under the zone rationale, to challenge the Comptroller's ruling pursuant to the National Bank Act that national banks could establish and operate collective investment funds—in competition with the investment companies. 401 U.S. at 620.[34]

Petitioners in effect seek to have the Court reverse the rationale of each of these cases. Here, too, the complainants would suffer competitive harm from the Comptroller's narrow interpretation of a National Bank Act restriction. The only "difference" is that the restriction at issue in this case applies to the location rather than the substance of bank activities—a

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34 Petitioners stretch to distinguish *Data Processing* and *Arnold Tours* by claiming that supposedly "no other party would have been entitled to bring suit" in those cases, whereas here state banks could bring suit. (Fed. P. at 24.) State banks, however, would also have suffered competitive injury as a result of competition from national banks providing travel services and data processing activities. Under petitioners' rationale, therefore, state banks would equally have had standing to challenge the Comptroller's rulings in each of those cases.

"difference" with no meaningful legal distinction. The geographic restrictions of Section 81 are but one reflection of the congressional determination, evident throughout the National Bank Act, to restrict the scope of national banks' activities in light of the unique nature and economic power of those institutions in our country.[35]

It is undisputed that the SIA has standing in this case to challenge the types of activities permissible for national banks. (*See* Compt. Pet. at 19-20; Sec. Pac. Pet. at 18-19.) It is incongruous to argue that, although the Comptroller's interpretation of the statutory provisions restricting the substance of bank activities may be challenged, his interpretation of the provisions restricting the location of those same activities may not. Both restrictions obviously were intended to limit the reach of competition by national banks, the effect of which was to benefit bank competitors, whoever they may be. And, interpretations of both those restrictions give rise to competitive injury against which Congress—at the very least "arguably"—legislated. As the courts below recognized (577 F. Supp. at 258-59, 24a):

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35 *See IBAA*, 535 F.2d at 936 (purpose of National Bank act was to circumvent the ability of "big banks," with their great economic resources, from further extending their financial dominance over commerce through geographic expansion and thereby "less[ening] competition in the financial sector."); *National Courier Ass'n* v. *Board of Governors*, 516 F.2d 1229, 1241 (D.C. Cir. 1975) (recognizing congressional policy opposing "economic concentration and conflicts of interest which underlie the statutory separation of commerce and banking"). The legislative history to the Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133 (codified as amended at 12 U.S.C. § 1841 *et seq.*), confirms this underlying policy of federal banking law. *See, e.g.*, H.R. Rep. No. 609, 84th Cong., 1st Sess. 1-2, 6 (1955) (geographic restrictions on bank activities prevent "concentration in all lines, cartels, the stifling of new enterprises, and stagnation. . . ."); 101 Cong. Rec. 8030-31 (1955) (critizing "unfair competition of giant interstate combines fortified with the income, resources and power flowing from vast nonbanking activities") (statement of Rep. Rains); 101 Cong. Rec. 8184 (1955) (statement of Rep. Wier).

> [T]he branching restrictions of the McFadden Act, read in conjunction with the original restrictions of the National Bank Act limiting national banks to one central office, evince the intent of Congress to curb the scope of national banks' activities. To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would harm SIA's members just as the data processors in *Data Processing* and the tour operators in *Arnold Tours*. Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

Petitioners' standing analysis, as does their argument on the merits, simply misses the argumentative boat. Again, they dwell solely on the branching language in Section 36 of the McFadden Act. They argue that it was intended to protect the competitive interests of state banks alone and therefore can provide no standing to the SIA. (Fed. P. at 19-21; Sec Pac. at 36.) And, again, they fail to consider that Section 36 was an *exception* to the broad prohibition of Section 81 in the National Bank Act, which is equally involved.[36] (*See* Point I, *supra*.)

Sections 36 and 81, as integrally related restrictions on national banks, should be considered together in defining a

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36 The analysis of the dissent below similarly considered only Section 36 and avoided the overall restriction and policy of Section 81. The dissent reasoned that Section 36 intended to protect only state banks and, by an analogy that underscores the importance of the dissent's logical lapse, suggested the SIA had no more standing than businesses competing for "parking spaces" occupied by a branch. (6a.) The competitive benefit flowing from the basic geographic restriction in Section 81, however, accrues to all competitors in lines of business in which national banks *compete*. National banks compete for brokerage customers; they do not compete for parking customers.

litigant's standing to challenge an interpretation under them.[37] Petitioners' analysis focuses only on the branching exception and ignores the basic locational rule. By arguing only about what Congress intended in *relaxing* the geographic restriction on national bank activities in 1927 and again in 1933, petitioners attempt to avoid the continuing Congressional objective that led to the enactment of the basic restriction in the first place.

Although neither the legislative history nor the terms of Section 81 itself may single out a specific group of competitors, its "general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the [Section] are easily identifiable." *Data Processing*, 397 U.S. at 157. Plainly, the competitive interests of SIA members are "directly affected" by the Comptroller's contravention of the "general policy" underlying Section 81. The SIA's standing to challenge the Comptroller's ruling should be affirmed.

## CONCLUSION

Petitioners have contended successfully that the permissible business of national banks includes discount securities brokerage. Yet petitioners now contend that such brokerage should not be subject to the same restrictions as apply to the rest of that business. Petitioners cannot have it both ways. As a statutorily authorized part of the business of banks, discount brokerage activities are subject to the same geographic restrictions as apply to all other functions undertaken by banks. The

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37 In applying the zone of interests test, courts may rely upon related provisions of the same statute, or even different statutes that share a common purpose. *E.g.*, *Autolog Corp.* v. *Regan*, 731 F.2d 25, 30-31 & 30 n.3 (D.C. Cir. 1984); *California Cartage Co.* v. *United States*, 721 F.2d 1199, 1203-06 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 110 (1984); *Taylor* v. *Jones*, 653 F.2d 1193, 1207-08 (8th Cir. 1981).

judgment of the Court of Appeals in this respect should be affirmed.

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# STATUTORY APPENDIX

The fundamental geographic restriction of the National Bank Act, 12 U.S.C. § 81, provides:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with [12 U.S.C. § 36].

The "branching" provisions are set forth in 12 U.S.C. § 36, which provides in relevant part:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
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> * * *
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> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.
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> * * *
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> (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.